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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DONNELL THOMAS, Petitioner.	2 CA-CR 2007-0215-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022184

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Following a jury trial at which he had chosen to represent himself, petitioner Donnell Thomas was convicted of one count of armed robbery, a dangerous-nature offense. He was sentenced to a presumptive, 15.75-year term of imprisonment, which he is serving concurrently with sentences of 4.5, 11.25, and twenty-one years simultaneously imposed

in two other causes.[1] After his conviction and sentence in this case were affirmed on appeal in *State v. Thomas*, No. 2 CA-CR 2003-0152 (memorandum decision filed May 20, 2005), Thomas in August 2006 filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.[2] The present petition for review follows the trial court's finding that Thomas had not stated a colorable claim for relief, its refusal to hold an evidentiary hearing, and its summary dismissal of Thomas's petition. We will not disturb that ruling unless the trial court has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 As detailed in our memorandum decision on appeal, Thomas was convicted of robbing a local bookstore by threatening an employee of the store with a pellet-gun pistol and demanding cash. Later that month, detectives investigating three separate robberies went to Thomas's house. Thomas's mother admitted them and informed them Thomas was in the bathroom. When he emerged, one of the detectives recognized him from photographs

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[1]Thomas was sentenced contemporaneously in Pima County cause numbers CR-20022200 and CR-20023124 for three additional offenses that he had also committed in 2002. The cases were not consolidated, but Thomas filed a single "motion to suppress evidence and confession" under all three cause numbers, and the motion was argued at a single, consolidated suppression hearing.

[2]The petition states Thomas filed a timely notice of post-conviction relief, which would have been due within ninety days after December 28, 2005, the date we issued our mandate on appeal in No. 2 CA-CR 2003-0152. Because the record currently before us commences with the petition filed on August 7, 2006, we cannot verify that a notice of post-conviction relief was timely filed. But we consider the petition for review on its merits because the trial court reached and ruled on the merits of the petition for post-conviction relief.

taken during one of the robberies. Thomas was handcuffed, taken into custody, and subsequently charged in three separate indictments. The trial court appointed counsel to represent him, but Thomas waived his right to counsel in this case and elected to represent himself. The trial court then directed his lawyer to act as advisory counsel.

¶3 In the first issue he raised below, Thomas contended the trial court committed fundamental error at the pretrial hearing on his motion to suppress by failing to inform him, pursuant to Rule 16.2(a), Ariz. R. Crim. P., of his right to testify at the suppression hearing without compromising his right against self-incrimination at trial. The trial court found no merit to Thomas's claim, in part because he had been assisted by advisory counsel who should have advised him of his right to testify,[3] and in part because Thomas had presented in argument at the suppression hearing the same information to which he claims he would have testified. In effect, the court determined Thomas had sustained no prejudice to his defense, even if the trial court had erred.

¶4 Although we have no quarrel with the substance of its ruling, the trial court need not have reached the merits of Thomas's claim because the issue was precluded: Thomas could and should have previously raised it on appeal. Pursuant to Rule 32.2(a), Ariz. R. Crim. P., Thomas was precluded from post-conviction relief on any issue he raised,

[3]In his petition for post-conviction relief in cause number CR-20022200, Thomas asserted an unsuccessful claim that advisory counsel had rendered ineffective assistance in advising him at the suppression hearing. *See State v. Thomas*, No. 2 CA-CR 2006-0262-PR (memorandum decision filed Jan. 31, 2007).

or forfeited by failing to raise, on appeal. He has sought to avoid the consequences of preclusion by claiming his appellate counsel was ineffective for failing to raise the issue on appeal.

¶5 Presenting a colorable claim of ineffective assistance of counsel requires a twofold showing "that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005). Here, as the trial court correctly ruled, Thomas met neither of those requirements below. Although he supplied an affidavit from appellate counsel stating counsel would have raised the issue on appeal had he discovered it in time, Thomas did not establish that counsel's failure to discern and raise the issue fell below prevailing professional norms for appellate counsel, nor did he convincingly show prejudice.

¶6 To demonstrate prejudice, Thomas was required to show that, had appellate counsel raised the issue on appeal, this court would have reversed Thomas's conviction. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). To reverse would have required us to find, first, that the trial court's failure to inform Thomas of his right to testify at the suppression hearing constituted fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005); *see also State v. Lamar*, 205 Ariz. 431, ¶ 50, 72 P.3d 831, 841 (2003) (fundamental error "'clear, egregious, and curable only via a new trial'"), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Such a finding, in turn, would have depended on Thomas's ability to show that his

not testifying at the suppression hearing "[went] to the foundation of his case, t[ook] away a right that [wa]s essential to his defense, and [was] of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. In other words, Thomas would need to be able to show that, had he been informed of his right to do so, he would have testified at the suppression hearing; his testimony would have persuaded the trial court to grant his motion to suppress; and, as a result, Thomas would have been acquitted at trial.

¶7 Thomas had virtually no chance of making such showing. As the trial court noted:

> Petitioner asserts that had he known of his right to testify, he could and would have testified to facts concerning the consent to enter his mother's residence, his mother's demeanor and infirmity, his own refusal to exit the bathroom and the reasons for exiting as he did. . . . Assuming Petitioner would have testified at the suppression hearing, he could not have testified to the facts regarding consent to enter, or to his mother's demeanor and infirmity at the time the officers entered the home. Petitioner by his own admission was not present when the Petitioner's mother consented to the entry by the officers. . . . Even so, the Court allowed the Petitioner to argue at the suppression hearing the very issues to which he claims he would have testified.

¶8 We cannot say the trial court abused its discretion in concluding that neither its ruling on Thomas's motion to suppress nor the outcome of the trial would have changed had Thomas testified at the suppression hearing rather than advancing the same contentions in his arguments before the court. Thomas has not demonstrated that appellate counsel's

performance was deficient or prejudiced the defense or that the trial court abused its discretion in denying post-conviction relief on this ground.

¶9 Thomas's second contention, below and here, is that the Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), constitutes a significant change in the law, applicable to Thomas's case, which "would probably overturn [his] conviction." Ariz. R. Crim. P. 32.1(g). *Randolph* held that police officers could not lawfully enter and search a shared residence based on the consent of one occupant when a second occupant was also present and contemporaneously objecting to the search. 547 U.S. at 120, 126 S. Ct. at 1526.

¶10 The state argued below that the holding of *Randolph* is not retroactively applicable and, therefore, does not apply to Thomas because his conviction had become final with the issuance of our mandate on appeal in December 2005, before *Randolph* was decided in March 2006. The trial court, however, found *Randolph* factually inapplicable because Thomas was not nearby or voicing any objections when his mother invited the officers into the home; instead, he was in a bathroom with the door closed. Because *Randolph* is both factually and legally inapplicable here, the trial court's rejection of Thomas's claim was appropriate and not an abuse of its discretion. *Randolph* did not constitute a significant change in the law for purposes of Rule 32.1(g).

¶11 Finally, Thomas claimed, and claims, that his sentence was improperly enhanced based upon his 1970 conviction for first-degree murder in Pima County cause

number A17852.[4] Because the statutes he had been convicted of violating were subsequently repealed,[5] Thomas claims it violated the prohibition against ex post facto laws to use his murder conviction to enhance his later sentence for armed robbery.

¶12 The sentencing minute entry in this case reflects that Thomas had previously moved to preclude the use of his murder conviction for enhancement, even before he was sentenced. Although it appears Thomas may have argued somewhat different grounds in attempting prospectively to preclude enhancement on the basis of his 1970 murder conviction, the arguments he now raises in this post-conviction proceeding were equally available to him in 2003 when he brought his first motion to preclude enhancement. The issue was similarly raisable, and thus again forfeited, on appeal. Consequently, Thomas is precluded from seeking relief on a claim he could have raised on appeal but did not. *See* Ariz. R. Crim. P. 32.2(a).

¶13 Not relying on preclusion, however, the trial court reached the substance of Thomas's claim. It ruled his sentence for armed robbery had been properly enhanced because his murder conviction was unaffected by the subsequent repeal of the statutes under which he had been charged and convicted in 1970. Not only do we agree, but we expressly so held in our decision on Thomas's appeal from his robbery conviction in cause number

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[4]Our decision on his appeal from that conviction is reported in *State v. Thomas*, 110 Ariz. 120, 515 P.2d 865 (1973).

[5]Thomas was convicted of violating former A.R.S. §§ 13-451 and 13-452, both of which were repealed in 1978. *See* 1977 Ariz. Sess. Laws, ch. 142, § 15.

CR-20022200. Thomas likewise argued there "that he was unconstitutionally sentenced under repealed statutes." In *State v. Thomas*, No. 2 CA-CR 2003-0154 (memorandum decision filed Sept. 1, 2004), we observed that "the statutes under which he was convicted had not been repealed at the time of his crime and conviction." Hence, we concluded, "the trial court did not err in using the conviction as an historical prior conviction as defined in A.R.S. § 13-604(V)(1)(a)." No. 2 CA-CR 2003-0154, ¶ 10. The trial court did not abuse its discretion in reaching the same conclusion here.

¶14 Finding no abuse of the trial court's discretion in dismissing Thomas's claims without an evidentiary hearing, we grant the petition for review but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge